00-5250 (2)

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-

Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

DAVID I. BRUCK
Attorney at Law

P.O. Box 11744
Columbia, S.C. 29211
(803) 765-1044

COUNSEL FOR PETITIONER

109 pp

QUESTIONS PRESENTED

1.

Whether petitioner's due process rights under Simmons v. South Carolina, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," Ramdass v. Angelone, 120 S.Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that Simmons no longer applies to South Carolina's capital sentencing scheme.

2.

Whether prosecutors' capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Wesley Aaron Shafer respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 39 of this Court. Petitioner previously applied for and was granted indigent status in the Union County, South Carolina Court of General Sessions. The affidavit of petitioner in support of this motion will be filed as soon as it received by counsel.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK

P.O. Box 11744
Columbia, S.C. 29211
(803) 765-1044

July 12, 2000

COUNSEL FOR PETITIONER

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CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming petitioner's conviction and death sentence for murder is as yet unreported, and is reprinted in the Appendix to this petition at A-1 to A-20.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 8, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law . . . ."

2. It also involves S.C. Code §§ 16-3-20 et seq. (1999 Cum. Supp.), which code section is reprinted in the Appendix to this petition at A-23 through A-26.

STATEMENT OF FACTS

1. Introduction

Simmons v. South Carolina, 512 U.S. 154 (1994), held that capital defendants have a due process right to rebut a prosecution claim of future dangerousness by informing the jury, if it

is so, that the jury's "life imprisonment" alternative means life imprisonment without the possibility of parole. At the time the Court decided Simmons, most South Carolina capital murderers sentenced to life imprisonment could be paroled after 30 years.[1] About a year after Simmons, however, the South Carolina legislature abolished parole for all convicted murderers. Act No. 83, § 10, 1995 S.C. Acts 557, codified as S.C. Code § 16-3-20 (Supp. 1999), reprinted infra at A-23 to A-26. The 1995 legislation specified life imprisonment without any possibility of parole or other early release as the only non-capital punishment available upon conviction for murder, provided that the state sought the death penalty and the sentencing jury rendered the offender death-eligible by finding the existence of one or more statutory aggravating factors. Id. A less-than-life alternative sentence of at least 30 years was available only if the death penalty was not sought, or if the jury found the offender ineligible for the death penalty due to the absence of any statutory aggravating circumstance. Id. Although this amendment greatly increased the number of South Carolina capital murderers subject to life without parole and thus to the benefit of the Simmons rule, in this case the South Carolina Supreme Court declared its actual

[1]The defendant in Simmons faced life without parole only because his prior criminal record triggered a statutory recidivist provision. See Ramdass v. Angelone, 120 S.Ct. 2113, 2119-21 (2000) (plurality opinion).

effect to be just the opposite: according to the state court, the availability of a less-than-life sentence for non-death-eligible murderers actually renders Simmons inapplicable to South Carolina capital sentencing proceedings. The facts giving rise to this decision are as follows.

2. Pretrial and trial proceedings.

About three months after the 1995 parole legislation went into effect, 18-year-old Wesley Aaron Shafer, Jr., confessed to fatally shooting a convenience store operator during an attempted robbery. A South Carolina state court jury subsequently convicted him of murder. At the capital sentencing proceeding which followed his conviction, the state relied on the statutory aggravating circumstance of attempted armed robbery, and also introduced nonstatutory aggravating evidence relating to petitioner's criminal activities and propensities.

Future dangerousness as such is not a statutory aggravating circumstance aggravating factor under South Carolina law, but "[a]lthough South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." Simmons v. South Carolina, supra, 512 U.S. at 162-63 (plurality opinion).[2]

[2]"South Carolina's death penalty sentencing scheme 'was patterned after the death penalty statutes of . . . Georgia,'" State v. Locklair, Op. 25161 (S.C., June 26, 2000), quoting State

While nonstatutory "selection" aggravating factors need not be specifically alleged by the prosecution, and the sentencing jury makes no specific findings as to their existence, South Carolina law does require the state to provide its evidence in aggravation to the defendant in writing prior to trial. S.C. Code § 16-3-20(B) (Supp. 1999); State v. Riddle, 353 S.E.2d 158 (S.C. 1987). In compliance with this notice requirement, the prosecution advised petitioner that the state intended to introduce in aggravation of punishment, among other things,

- "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm as an adult and a juvenile," R. 9,
- "evidence . . . as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile . . ." R. 10, and
- "evidence . . . relating to his release or parole from jails and/or prisons as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future." R. 10.

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v. Shaw, 255 S.E.2d 799, 802 (S.C. 1979), and is a thus a "non-weighing statute." Under such statutes, death eligibility is established by proof of a single statutory aggravating circumstance, S.C. Code § 16-3-20(C) (Supp. 1999), and the sentencing jury is then authorized at the "selection" stage to consider all facets of the crime and of the defendant's character and prior record in deciding whether to impose the death penalty or life imprisonment. State v. Shaw, supra, 255 S.E.2d at 808; State v. Plath, 313 S.E.2d 619, 623 (S.C. 1984); see also, Zant v. Stephens, 462 U.S. 862, 872 (1983) ("'In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'" (quoting from Georgia Supreme Court's description of Georgia statute)) Nonstatutory aggravating factors, such as the defendant's prior criminal behavior, his character, and his future dangerousness, are thus all admissible as sentencing considerations.

After receiving this formal notice that the prosecution intended to rely upon petitioner's "propensity to commit . . . acts of violence" as a reason why the jury should sentence him to death, petitioner repeatedly requested, pursuant to Simmons and S.C. Code § 16-3-20(A), that the court instruct the sentencing jury that its capital sentencing alternative of life imprisonment carried no possibility of parole or other form of early release. However, despite its pretrial allegations concerning petitioner's alleged incorrigibility and dangerousness, the state energetically opposed such a no-parole instruction at trial, while semantically re-characterizing its own evidence in an effort to avoid the effect of the Simmons rule.

The state's sentencing evidence included testimony by law enforcement and jail personnel concerning petitioner's criminal record and his allegedly defiant and assaultive behavior in pretrial detention. Through these witnesses, the state sought to establish the following facts:

- at age 17, petitioner was convicted of burglary and criminal sexual conduct, after he and some friends confessed to having sex with two 12-year-old girls in an unoccupied house, R. 1446 to 1450;
- after receiving a probationary sentence for his burglary and criminal sexual conduct convictions, petitioner violated probation by being rearrested for burglary and driving under suspension, by twice testing positive for marijuana, and by failing to report both to his probation officer and for

court-ordered sex offender counseling, R. 1483-84, 1488;

- while awaiting trial for capital murder, petitioner was charged with assaulting a female staff member at the county jail after he became enraged and verbally abusive because she had terminated the inmates' telephone calls, R. 1468-1471;
- petitioner was also charged with possession of contraband in the jail for illegally possessing and smoking cigarettes, R. 1478-1480;
- that on the night of his arrest, petitioner asked a jailer whether his father would get his pistol back after it had been seized as the murder weapon, R. 1501, and
- that petitioner acted like the murder "didn't even bother him" when discussing it with a fellow jail inmate shortly after his arrest. R. 1490, 1493.

Petitioner's mitigation evidence consisted primarily of testimony concerning the physical and emotional abuse that he had suffered as a small child and as an adolescent. R. 1578-81, 1584-95, 1598-99. He also introduced expert psychological testimony to the effect that the unrelenting mental and physical abuse he endured over the course of his childhood had left him traumatized, chronically depressed, and at risk for drug abuse and explosive outbursts of aggression. R. 1623-30; 1711.

At a charge conference near the end of the defense case in mitigation, the prosecutor argued that petitioner was not entitled to a Simmons instruction on parole ineligibility because, as in State v. Southerland, 447 S.E.2d 862 (S.C. 1994), the prosecution had not "made future dangerousness an issue in this case."

R. 1817-18.[3] The prosecutor further requested, for the same reason, that the judge "prevent the defense from arguing in their closing argument anything to the effect that he will never get out of prison or anything of this order." R. 1818. Defense counsel protested that the prosecution had presented evidence of petitioner's assaultive and lawless behavior in jail after his arrest, asserting that "if you put a jailer on to say that [petitioner] is charged with assault and battery on me, that is future dangerousness." R. 1819. In response, the prosecutor averred that

> [h]e was charged with simple assault, not assault and battery. And, second, we put that in for two reasons, to show his character and to show his adaptability to prison, not future dangerousness. Nobody has argued future dangerousness or said that he might do this again in the future, and the state doesn't intend to in its closing argument.

R. 1819. After further discussion, the trial judge ruled that the state had not yet "argued" future dangerousness as a sentencing consideration, and unless this changed, he would not charge the jury concerning petitioner's parole ineligibility. R. 1820-21.

Defense counsel next requested that he be permitted to read

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[3]Earlier in the proceedings, the state had succeeded in preventing any mention of South Carolina's abolition of parole during the voir dire examination of prospective jurors, R. 101, and obtained a similar ruling prior to defense cross-examination of a key state's witness that the state feared might "educate the jury as to the non-existence of parole eligibility." R. 1182.

the relevant portion of S.C. Code Ann. § 16-3-20(A) to the jury. R. 1838. In pertinent part, that code section provides as follows:

> If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt. . . and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section,"life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

With the state's consent, the trial court eventually agreed to charge that portion of the statute providing that "'life imprisonment' means until death of the offender." R. 1840-41, -43. However, the court denied defense counsel's request that he be permitted to read the rest of the above-quoted section of Code § 16-3-20(A) to the jury in the course of argument in order to make clear that life imprisonment excluded all possibility of parole. R. 1839.

Having thus ensured that the jury would not be "educate[d] as to the non-existence of parole eligibility," the prosecutor ended his closing argument with a dramatic evocation of the murder scene which wove together his belief in the alleged deterrent value of capital punishment with the witnesses' expressed fear, after discovering the dying victim, that the

killers "might come back." The prosecutor stated:

> Ladies and gentlemen, one of the scariest things . . . about . . . the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying, "Oh God; oh, God; oh, God, Ray," and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says, "Come on, Jamie, <u>they might come back, they might come back.</u>"
>
> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the state. So the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, <u>and they might come back, they might come back</u>, they will remember this day, and they will remember this jury, and they will remember this verdict.

R. 1891-92 (emphasis added).

At the conclusion of the argument, defense counsel renewed petitioner's request for a no-parole instruction on the grounds that the prosecutor's dramatic and repeated evocation of the witnesses' fear that the murderers "might come back" had again raised the issue of petitioner's future dangerousness. R. 1893-1896. The prosecutor continued to deny having suggested that petitioner would be dangerous in the future, insisting that his argument was intended only to urge the general deterrent effect of a death sentence in this case on other would-be murderers. The trial judge denied petitioner's renewed request for a <u>Simmons</u> instruction, stating that the prosecutor's jury argument "comes

close" to a future-dangerousness claim, but did not "cross the line." R. 1896.

In keeping with this ruling, the trial judge never informed the jury at any point in his sentencing instructions that South Carolina law prohibits parole or other form of early release for a defendant who has been sentenced to life imprisonment for murder. The judge did state that "life imprisonment means incarceration of the defendant until his death." R. 1926. However, after three-and-a-half hours of deliberation, the jury sent two written questions to the court which revealed that the jury had not interpreted the court's "incarceration until death" instruction as necessarily precluding the possibility of parole:

> 1. Is there any remote chance for someone convicted of murder to be eligable [sic] for parole?
>
> 2. Under what conditions would someone convicted for murder be eligable [sic]?

R. 1937-38. There followed more than 45 minutes of discussion between the court and counsel while the jury waited for an answer to its questions. The state continued to insist that the jury should not be informed of the unavailability of parole because "future dangerousness has not been argued as an issue." Petitioner's counsel renewed his earlier request that the court read to the jury those portions of S.C. Code § 16-3-20(A) immediately preceding and following the single sentence already charged. R. 1941-42. The court denied this request, and eventually decided

PUBLISHER'S NOTE:

Page 11 is missing in original document.

belief therein, gave rise to their verdict." Counsel also requested the court to make an inquiry of a member of the trial jury who had indicated during jury selection that she worked for the parole board, R. 389, to determine whether she had "expressed personal knowledge outside of the evidence and the law given." R. 1961. The trial judge denied both requests, dismissed the jury, and sentenced petitioner to death. R. 1961-64.

3. Appeal

On direct appeal to the South Carolina Supreme Court, petitioner renewed his argument that the federal due process rule of Simmons v. South Carolina entitled him to advise the jury of the unavailability of parole had he been sentenced to life imprisonment. State v. Shafer, Brief of Appellant at 24-30; Reply Brief at 4-16. In response, the state advanced a new rationale to justify the denial of a Simmons instruction. Pointing out that under South Carolina's amended sentencing statute, a capital defendant can receive a less-than-life sentence if the jury finds no statutory aggravating circumstance, the state insisted that the South Carolina statute no longer satisfies the first, "life-without-parole" requirement of Simmons. As a result, according to the state, Simmons no longer applies to any South Carolina capital proceedings conducted under the post-1995 statute--despite the fact that once the jury determines that the defendant is death-eligible and turns to the

issue of whether to impose the death penalty, the only available non-capital alternative under South Carolina law is life imprisonment without possibility of parole or other form of early release. State v. Shafer, Brief of Respondent at 21-29.[4]

With one justice dissenting, the South Carolina Supreme Court agreed with this argument, and on that basis upheld the trial judge's refusal to give a Simmons instruction. In petitioner's case and in a companion case decided the same day, State v. Starnes, Opinion No. 25119, 2000 WL 576191 (S.C., May 8, 2000),[5] the state supreme court majority held Simmons to be inapplicable to post-1995 South Carolina capital cases "because life imprisonment is not the only legally available sentence alternative to death." State v. Shafer, Opinion No. 25120 (S.C., May 8, 2000), infra at A-1, A-6. In its Starnes opinion, to which the Shafer opinion referred, the state court quoted at length from the amended S.C. Code § 16-3-20, emphasizing those provisions that authorize sentences of as little as 30 years if (and only if) "no aggravating circumstance is found." § 16-3-

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[4]The state did acknowledge that a Simmons instruction might still be required where the prosecution had exercised its discretion to invoke a recidivist statute that mandates life sentences for certain second or third felony convictions. State v. Shafer, Brief of Respondent at 29, citing S.C. Code § 17-25-45 (Supp. 1999).

[5]The state court reversed the convictions in Starnes on other grounds, thereby rendering moot the Simmons issue in that case.

20(B). Starnes, supra, at *8. The court did not, however, include or refer to the next section, § 16-3-20(C), which provides in relevant part:

> Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A) . . . . If the jury does not unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation.

(Emphasis supplied). To petitioner's argument that under the portion of § 16-3-20(C) quoted above, a South Carolina jury does not even deliberate on the issue of sentence unless and until it has found an aggravating circumstance--at which point the only alternatives are indeed death and life without parole--the state supreme court responded as follows:

> Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added).

Because a sentence of as little as 30 years could be imposed--albeit only if the jury failed to find the defendant death-eligible, and thereby passed sentencing responsibility to the judge--the state court majority held Simmons inapplicable to the

amended South Carolina sentencing scheme. In support of this holding, the court cited a series of state and federal cases holding Simmons inapplicable where, if the jury declined to impose the death penalty, the defendant would have been eligible either for parole, Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996); or for a less-than-life sentence to be selected by the court. United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996). Infra, A-6 to A-7.

After rejecting petitioner's Simmons claim, the state court also held that a separate eighth amendment claim was procedurally defaulted because his trial counsel had failed to elaborate upon his citation of the eighth amendment as one of the bases of his objection. A-8. The court then rejected petitioner's eighth amendment claim on its merits, A-8 to A-11, and approved the trial court's supplemental instructions under pre-Simmons South Carolina case law. A-11 to A-14.

On June 6, 2000, the South Carolina Supreme Court stayed petitioner's execution to allow the filing of this petition for writ of certiorari. A-21 to A-22.

WHY THE WRIT SHOULD BE GRANTED

1. South Carolina's declaration that Simmons v. South Carolina no longer protects capital defendants in that state is flatly inconsistent with Simmons and should be reversed.

A. South Carolina's capital sentencing scheme unquestionably satisfies the life-without-parole requirement of *Simmons* and *Ramdass*.

Mistaking an out-of-context phrase from Justice O'Connor's concurring opinion in Simmons for the holding of the case, the South Carolina Supreme Court's decision here and in Starnes would, if allowed to stand, effectively nullify the protection afforded South Carolina capital defendants by the due process rule of Simmons. Until this case, South Carolina was one of only two life-without-parole jurisdictions that still refused to inform capital sentencing juries of the non-existence of parole except to the extent required by Simmons. State v. Southerland, 447 S.E.2d 862 (S.C. 1994) (Simmons instruction not required because state did not rely on future dangerousness), vacated on other grounds, 524 S.E.2d 833 (S.C. 1999); Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996) (same); but see, Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999) (requiring no-parole instructions even where future dangerousness not at issue). With its decision here, South Carolina seeks to extend this refusal far beyond what Simmons and due process permit. This Court

should not countenance such clear disregard of one of its constitutional decisions in a capital case.

The South Carolina Supreme Court's error in this case is plain. The state court overlooked that if the jury fails to find any statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) provides that the jury "shall not make a sentencing recommendation" at all, and the selection of a noncapital sentence becomes the sole province of the court. Under the current South Carolina sentencing scheme--and under the jury's instructions in this case--the jury does not even engage in sentencing deliberations unless and until it has established the defendant's death-eligibility by finding at least one statutory aggravating circumstance. And once that point is reached, it is undeniably true, as the trial judge explained to petitioner's jury, R. 1917, 1919-20, 1930-31, that the only two possible sentences are death and life imprisonment. What petitioner's jury did not know, even after inquiring about the subject, was that "life imprisonment" means life imprisonment without possibility of parole.

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), on which the state supreme court relied, is inapposite. Flores involved a federal murder statute, 21 U.S.C. § 848(e), which provides for sentences ranging from 20 years to death. The jury's only sentencing function under § 848 is to decide whether or not to impose the death penalty: if it does not, the judge

selects a non-capital sentence. 21 U.S.C. § 848(k). While the facts of Flores made any less-than-life sentence highly unlikely, federal law did not preclude such a sentence, and so Simmons did not apply. 63 F.3d at 1368; accord, Ramdass v. Angelone, 120 S.Ct. 2113 (2000). South Carolina's sentencing system, by contrast, requires the jury to choose between life and death, and does preclude any sentence less than life without parole once the jury's sentencing role is triggered by a finding of death-eligibility. Because state law provides no alternative but life without parole for any jury that actually considers whether to sentence a defendant to death, the Simmons requirement of a life-without-parole alternative to the death penalty is now satisfied in every South Carolina capital case, including this one.

If Simmons itself could have left any doubt on this point, Ramdass v. Angelone removes it. In Ramdass, decided just after the South Carolina Supreme Court's decisions in Shafer and Starnes, Justice Kennedy explained for a four-member plurality of the Court that "[t]he premise of the Simmons case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence." 120 S.Ct. at 2119. Later, Justice Kennedy elaborated on this point, observing that under Simmons, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law."

Id., 120 at 2120.

This description of the scope of Simmons clearly includes the amended South Carolina statute under which petitioner was sentenced. Petitioner's jury was given a life-imprisonment alterative, and was required (after finding an aggravating factor) to impose either life or death. The fact that a lesser sentence might have been imposed if the jury did not find a statutory aggravating circumstance is irrelevant, both because any South Carolina jury with the legal authority to impose the death penalty case can also impose a life-without parole sentence (and no other alterative sentence), and because a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose--or even consider--any other sentence. Thus it is just as true in petitioner's case as it was in Simmons itself that the only non-capital sentence available to the sentencing jury was life without parole.

B. The prosecution placed petitioner's future dangerousness in issue.

The state supreme court did not address the state's alternative argument for denying a Simmons instruction, which was that the prosecution did not "argue" future dangerousness as an aggravating factor. Since the state will likely renew this argument as an alternative reason to deny review, petitioner will address it here.

As is often the case, the state's evidence bearing on future

dangerousness centered on the facts of the crime itself, petitioner's prior criminal record, his violations of probation, and his misbehavior in confinement. Before trial (and apparently before considering the Simmons implications of its evidence), the state forthrightly characterized much of this case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." R. 9. The state later re-characterized this evidence as relating to petitioner's "character" rather than to his "dangerousness" in an effort to avoid a Simmons instruction, but the evidence itself did not change. Thus the state introduced petitioner's prior record for burglary and criminal sexual conduct, along with evidence that petitioner had threatened and assaulted a female jail employee while awaiting trial.

While this evidence was arguably relevant to more than one issue, future dangerousness was undeniably one of the issues suggested by evidence that petitioner committed sexual crimes against a 12-year-old-girl, and that he was prone to angry and impulsive outbursts of aggressive behavior. After listening to the jail officer's testimony concerning petitioner's angry assault on her, and considering the extreme impulsivity revealed by the videotape of the murder itself, the jury likely found itself wondering (and discussing) whether the risks of allowing petitioner to live were unacceptably great. Would he repeat this

sort of behavior? Would he prove similarly impulsive and angry in the future? Would he strike again, whether in prison or, if released, in society? And the fact that the jury found it necessary to ask the judge whether petitioner would ever be eligible for parole further indicates that the evidence tending to show his future dangerousness was indeed interpreted in just this way. Given the evidence and the jury's parole questions, it is plain that petitioner's future behavior, and his potential for future dangerousness, were among the factors weighed by the jury as it deliberated life and death.

In this connection, the type of evidence presented by the state in this case is regarded as tending to prove future dangerousness in states where dangerousness is a formal statutory factor. Both Virginia and Texas, which employ future dangerousness as statutory aggravating factors, have held that the facts of the capital murder itself alone may support a finding of dangerousness beyond a reasonable doubt. See, e.g., Pope v. Commonwealth, 360 S.E.2d 352, 361 (Va. 1987), cert. denied, 485 U.S. 1015 (1988) (holding that future dangerousness factor was established by "the unprovoked and sudden nature of the violence Pope employed on the two victims in this case, who were unarmed and constituted no threat to him, as well as the unnecessary degree of deadly force he chose to employ to accomplish his purpose of robbery and to quell resistance."); Cantu v. State,

842 S.W.2d 667 (Tex. Crim. App. 1992), cert. denied, 509 U.S. 926 (1993) (restating general rule that "the circumstances of the offense alone, if severe enough," can support finding of future dangerousness beyond a reasonable doubt). Likewise, evidence of prior convictions and other violent or anti-social conduct is almost always offered to prove future dangerousness where such evidence is available. See e.g., Johnson v. Texas, 509 U.S. 350, 355 (1993) (state proved future dangerousness by introducing 19-year-old offender's prior crimes); State v. Tucker, 478 S.E.2d 260, 269-70 (S.C. 1996), cert. denied, 520 U.S. 1200 (1997) (recognizing that evidence of past criminal behavior is highly relevant to both character and future dangerousness of convicted murderer).

Because South Carolina is a "non-weighing" jurisdiction, petitioner's jury was not required to indicate whether it had drawn such commonsense conclusions about his future behavior from the evidence of his past behavior. But the jury's instructions clearly authorized it to draw such conclusions. See e.g. R. 1924-25 (court instructs that jury may consider petitioner's prior offenses "as evidence of his character, his characteristics . . . and you may give them whatever weight you deem proper . . . ."). And the jury's parole questions strongly suggest that it did.

To be sure, the prosecutor avoided using the term "danger-

ousness" in his closing argument, since he knew that under Simmons too explicit a discussion of that issue would doom his efforts to keep the jury in the dark about petitioner's ineligibility for release. But when he dramatically and repeatedly recalled a witness's videotaped warnings after the shootings that the killers "might come back," he was powerfully evoking the jury's fear of future depredations by a killer who has been loosed upon society. Of course, "they might come back" was a metaphor rather than a literal description of the danger that petitioner posed in the future. But so was the prosecutor's "dangerousness" argument in Simmons itself. In that case the prosecutor never used the terms "dangerous" or "dangerousness," nor did he offer any prediction of what the defendant would do in the future if not executed. The sum total of the Simmons prosecution's injection of future dangerousness, as summarized both by the plurality and by Justice O'Connor's concurrence, was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were hardly unmistakably clear. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons' future behavior: to the

dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate social response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting).

In this case, the prosecutor's haunting evocation of the witnesses' terrified cries that the killers "might come back" was at least as pointed a reference to the defendant's future dangerousness as anything in Simmons. Just as in Simmons, that argument entitled petitioner to inform the jury that he would not be "coming back" even if his life was spared, because under South Carolina law he would never be released from prison. And petitioner's right to so inform the jury was all the greater in light of the state's evidence which preceded it--evidence calculated to convince the jury of petitioner's dangerous impulsivity, anger and aggression.

Whether a given question is "in issue" before a jury depends not on the exact phraseology of the parties' closing arguments, but on the evidence presented and the legal framework within which the jury must come to judgment. In this case, the jury was certainly authorized to consider 19-year-old Wesley Shafer's likely future dangerousness as a reason to sentence him to death. State v. Woomer, 299 S.E.2d 317, 319-20 (S.C. 1982). The state

did everything it could, short of using the word "dangerousness," to encourage such consideration. Indeed, if future dangerousness had not been sufficiently "in issue" to trigger the due process protection of Simmons, petitioner would presumably have been entitled to an instruction directing the jury not to consider or even discuss the question of his likely future conduct as a reason to sentence him to death. But any attempt to craft an instruction differentiating the evidence of petitioner's dangerousness (i.e. his "characteristics" as revealed by his conduct) from the issue of his dangerousness will only serve to reveal the impracticality of the undertaking. In this case, dangerousness simply could not have been artificially excluded from the jurors' minds. This is so both because the evidence and the prosecutor's argument put the issue squarely before them, and because in a non-weighing jurisdiction such as South Carolina, no rule of law limits the jury's reasons for imposing the death penalty on a death-eligible defendant, nor requires the jury to perform the mental gymnastics necessary to segregate the issue of dangerousness from the overlapping issue of character.

In Simmons, dangerousness was raised in part (as it was here) by a veiled prosecution argument. But nothing in Simmons suggests that only the prosecutor's jury argument can inject the issue of dangerousness into a jury's sentencing deliberations, and common sense dictates otherwise. The unstructured manner in

which juries consider future dangerousness in non-weighing jurisdictions such as South Carolina increases the importance of careful judicial review to ensure that the Simmons rule is not evaded by the sort of semantic hairsplitting which the prosecution employed here.

In this case, both the prosecutor's argument and the evidence as a whole would logically have led the jury to consider the practical consequences--and potential dangers--of allowing Wesley Shafer to live. Simmons therefore entitled him to a fair hearing on that issue, by ensuring that the jury understood the full incapacitative effect of its life imprisonment option.

2. Petitioner was denied due process by the operation of a South Carolina rule that permits prosecutors to urge imposition of the death penalty to deter future murders, while forbidding capital defendants from proving that the death penalty has no such special deterrent effect.

A. How the deterrence issue arose and was decided below.

The prosecutor concluded his penalty phase closing argument by urging the jury to sentence petitioner to death in order to "send a message" to future would-be murderers.

> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union county, to the state. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

* * * *

> Let everyone know that this day in Union County justice was done in this case that will send a message of how Union County handles a crime of this nature.

Tr. 1891-1893. As petitioner has already pointed out, this argument was part of a veiled effort--centering on the prosecutor's evocative repetition of a witness's cry that the killers "might come back"--to focus the jury's attention on petitioner's future dangerousness. However, the prosecutor's argument was also a vivid appeal to impose the death penalty for its utility as a general deterrent--that is, for its supposed effect in deterring other potential murderers from committing future crimes. Indeed, in denying that his argument referred to petitioner's own dangerousness, the prosecutor insisted that "it was clear we were talking in the future context of people other than the defendant"--i.e. of general, rather than specific, deterrence. Tr. 1894.

In response, defense counsel made the following requests:

> [W]e would ask that the Court reopen the defense case during the sentencing to present issues of statistics and witnesses as to the death penalty not being a deterrent pursuant to the solicitor's comment that it would . . . keep others from coming back into the community and doing the same thing, and saying that it would send a message to the community to keep others from doing the same. Deterrence is not an issue unless brought in issue by the state; the prosecutor has done so, and we ask for time to present evidence to rebut that.

> In the alternative, we would ask the Court to instruct the jury to completely disregard any comments by the solicitor in regard to danger to the community.

Tr. 1894. The prosecutor countered, citing State v. George, 476 S.E.2d 903 (S.C. 1996), that "there is nothing to prevent the defense from arguing that it [the death penalty] is not a deterrent." Tr. 1895. Defense counsel insisted that the state's argument would deny due process, Tr. 1896, but trial judge denied both defense requests, stating: "Well, as our courts often do, they say you can't introduce that type evidence, but you can argue it. I'm not questioning the logic of our higher courts, but I'm going to deny your motion." Tr. 1895.

The trial court's ruling was based on a line of South Carolina cases upholding the right of a prosecutor to urge upon the jury his or her personal opinion concerning the general deterrent efficacy of the death penalty, while at the same time forbidding the defendant from presenting evidence tending to show that such opinions have no basis in fact. As the South Carolina Supreme Court summarized these decisions in State v. George, supra,

> [E]vidence attempting to establish the effectiveness and propriety of capital punishment as an instrument of deterrence is irrelevant and should not be admitted. State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), cert. denied, 467 U.S. 1265, 104 S.Ct. 3560, 82 L.Ed.-2d 862 (1984); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1413 (1983). However, counsel for both sides may argue their respective opinions concerning the deterrent effect of capital punishment,

> but cannot introduce specific data to corroborate their views. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168 (1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989), cert. denied, 494 U.S. 1060, 110 S.Ct. 1534, 108 L.Ed.2d 773 (1990).

476 S.E.2d at 914.

On appeal, petitioner renewed his claim that due process entitled him either to present rebuttal evidence concerning general deterrence, or have the jury instructed to disregard the prosecutor's unsupported claims on the subject. The South Carolina Supreme Court rejected petitioner's due process challenge in the following discussion:

> In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.
>
> Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. 1061, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly

allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

State v. Shafer, infra, A-15 to A-16.

B. The Court should grant review to decide whether capital sentencing arguments based on general deterrence violate due process when state law immunizes them from evidentiary rebuttal.

Petitioner's due process claim is a narrow one. He does not at all challenge the authority of the states to exclude evidence bearing on the issue of general deterrence. He submits only that while states may (and most states do) bar defendants from presenting evidence on the death penalty's lack of efficacy as a general deterrent, due process is violated when the prosecution is allowed to urge a jury to impose the death penalty on a particular defendant for reasons of general deterrence, while the defendant is prohibited from responding with evidence to contradict the state's position.[6] This imbalance violates the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" Skipper v. South Carolina, 476 U.S. 1, 5, n. 1 (1976), quoting Gardner v. Florida, 430 U.S. 349, 362 (1977); accord, Simmons v. South Carolina, 512 U.S. 154 (1994).

South Carolina's resolution of this issue conflicts with that of several other states which forbid both argument and evidence regarding the deterrent effect of the death penalty in capital sentencing proceedings. For example, in People v. Marshall, 919 P.2d 1280, 1314 (Calif. 1996), the California Supreme Court held:

> [D]eterrence arguments rest on unproven assumptions and place a foreign weight on the scale on which should instead be made an individualized determination as to penalty. This principle is equally true whether it is the prosecutor who seeks to argue the death penalty's deterrent value, or the defense its opposite. Questions of deterrence or cost in carrying out a capital sentence are for the legislature, not for the jury considering a particular case.)(citations omitted);

Accord, Johnson v. State, 660 So.2d 637, 646 (Fla. 1995) (barring defense evidence on deterrence); Sutton v. State, ___ S.W.2d

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[6]For a recent survey of the social science research on the deterrent value of the death penalty, see William C. Bailey and Ruth D. Peterson, "Murder, Capital Punishment and Deterrence: A Review of the Literature," in Hugo Adam Bedau, ed., The Death Penalty in America: Current Controversies 135-161 (Oxford: 1997). Bailey and Peterson conclude that "[t]he available evidence remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder." Id. at 155.

____, 1999 WL 423005, *26 (Tenn. Crim. App. 1999) ("the issue of specific or general deterrence should be avoided by the prosecution in closing argument at a capital sentencing hearing"); State v. Kirkley, 302 S.E.2d 144, 155 (N.C. 1983) (argument that death penalty should be imposed as a general deterrent amounted to improper interjection of prosecutor's personal opinion); State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988) cert. denied, 489 U.S. 1071 ("any argument based on general deterrence . . . is inappropriate at a [capital] sentencing hearing"); People v. Brisbon, 478 N.E.2d 402, 414-15 (Ill. 1985) (prosecutor's claims concerning alleged general deterrent effect of death penalty had "no more place in the sentencing determination than the 'speculative possibility' of parole"); but see Fleming v. State, 458 S.E.2d 638, 640 (Ga.1995)("Under well-established holdings of this court, both the prosecution and the defense have the opportunity to argue the issue (of deterrence) to the jury; both the prosecution and defense are precluded from introducing evidence on the issue.").

To be sure, general deterrence--the belief that potential criminals will respond to the example of severe punishment by refraining from committing crimes--is a permissible goal of a state legislature in adopting capital punishment as a penal sanction. Gregg v. Georgia, 428 U.S. 153, 186 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.). It is not, however, a proper or sufficient basis upon which to decide to impose a death sentence on a particular defendant. Spaziano v. Florida, 468 U.S. 447, 461 (1984). Rather, in a capital case, "the sentence imposed . . . should reflect a reasoned moral response to the defendant's character, background and crime." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotations and emphasis omitted); People v. Brisbon, supra ("the defendant had a right to be judged on his conduct alone, without the introduction of inflammatory considerations" such as the prosecutor's deterrence claims).

General deterrence as an objective in individual capital cases conflicts with the constitutional requirement that the sentencing authority focus on the individual defendant and his specific crime. This is so because deterrence does not look to the question of whether the individual defendant deserves to be put to death, but directs the jury's attention instead to the question of whether imposition of the death penalty on this defendant will have a deterrent effect on other potential murderers--persons who have nothing to do with this defendant or this crime, whose identities are unknown, and who may not even exist. Deterrence as an objective of capital sentencing encourages the sentencer to regard the defendant on trial as simply a means to an end, and by its inherent logic tends "to treat all persons convicted of a designated offense not as uniquely indi-

vidual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The fact that petitioner's court-appointed counsel enjoyed the same right as the prosecutor to inject irrelevant and unproven policy considerations into the sentencing process does not satisfy the requirements of due process. A prosecuting attorney is not simply another lawyer. He represents the authority and credibility of the state itself, and when he makes a factual claim concerning the practical utility of a given verdict, he speaks as the law enforcement official whom the people have chosen to represent and safeguard them. Berger v. United States, 295 U.S. 78, 88 (1935). Whether imposition of the death penalty against a particular defendant will serve to deter future murders is the sort of question on which a jury likely to defer to the experience and specialized knowledge of the prosecuting attorney, and the defense lawyer's self-serving protestations to the contrary can hardly be expected to redress the imbalance. Despite the South Carolina Supreme Court's assurance that both sides are free to argue this point, it is simply not fair to pit two such unequal combatants in a test of personal credibility.

Because the state court failed to abide by the due process rule of Simmons, the jury that decided petitioner's fate did so

without a critical piece of information--the fact that he would never be paroled or otherwise released from prison if his life was spared. Having succeeded in keeping this truthful and important information from the jury, the prosecution compounded the unfairness of the proceedings by extolling the power of a death sentence in this case to prevent future murders--while petitioner could not respond with evidence to the contrary. South Carolina's endorsement of the prosecutor's right to urge jurors to impose the death penalty as a tool to deter others, in a setting that immunizes such claims from factual refutation, presents an important federal constitutional question on which state courts are divided. The Court should grant certiorari to answer it, and to restore the fundamental fairness of South Carolina capital sentencing hearings.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

BY: David I. Bruck
DAVID I. BRUCK
Attorney for Petitioner

July 12, 2000.

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer, Jr., Appellant.

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25120
Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) (Supp. 1998).

register counter, and shot Broome a second time.[3] Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

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[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on Simmons v. South Carolina, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of § 16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. Id.; State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y]our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

his view, would not pose a future danger to society." Simmons, 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held Simmons is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues Simmons mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read Simmons so narrowly. By its own terms, Simmons requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. Simmons, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole. . .".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999) (Simmons is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

[7]In Starnes, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

therefore Simmons is inapplicable); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; Simmons does not apply even if it is unlikely defendant would be paroled); People v. Simpson, 665 N.E.2d 1228 (Ill.), cert. denied, 519 U.S. 982 (1996) (Simmons inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (Simmons inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, Simmons was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting Flores, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In Flores, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in State v. Starnes, supra, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. Jones v. United States, 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. Payne v. Tennessee, 501 U.S. 808, 822 (1991), citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." California v. Ramos, 463 U.S. 992, 1001 (1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. Id.; see Simmons v. South Carolina, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. Id.

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), cert. denied 513 U.S. 1166 (1995), overruled on other grounds State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on Skipper v. South Carolina, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

[10]O'Dell v. Netherland, 521 U.S. 151, 165 (1997) ("[i]n Simmons, the Court carved out an exception to the general rule described in Ramos by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11]Appellant agrees there has been a blanket prohibition against any instruction on parole eligibility or ineligibility.

Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4, citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); see State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In Skipper, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or ineligibility is a legislative determination; it is not mitigating evidence. See State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989), vacated on other grounds 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); see also State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. State v. Plath, 281 S.C. 1, 313

S.E.2d 619, cert. denied 467 U.S. 1265 (1984); see State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), citing State v. White, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole ineligible. The Eighth Amendment does not compel a different result. Jones v. United States, 527 U.S. 373,___, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with Norris, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although Norris was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in Simmons v. South Carolina, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

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[12]In Ard we held the trial judge's erroneous mention of parole was harmless. To the extent Ard suggests the trial judge should charge the jury on parole eligibility if requested by the defendant, it is overruled. We note Ard was decided eight months after the present case was tried.

[13]But see footnote 7.

eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

> A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. **If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.** No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

> There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'
>
> The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied 522 U.S. ___, 118 S.Ct. 146 (1997). In any event, the record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986)[14] (trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).[15] Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect of the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]Overruled on other grounds Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Casey, 305 S.C. 445, 409 S.E.2d 391 (1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

deterrence. See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied 519 U.S. ___, 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge general deterrence need not be considered); State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), cert. denied 471 U.S. 1036 (1985), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatedly allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. State v. Truesdale, 301 S.C. 546, 393 S.E.2d 168, cert. denied 498 U.S. 1074 (1990); State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989); State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied 462 U.S. 1124 (1983), overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. See S.C. Code Ann. § 16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997), cert. denied, 523 U.S. ___, 118 S.Ct. 1674 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. ___, 118 S.Ct. 146 (1997); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, cert. denied, 520 U.S. ___, 117 S.Ct. 2460 (1996); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, cert. denied, 520 U.S. ___, 117 S.Ct. 2441 (1996); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), cert. denied, 519 U.S. ___, 117 S.Ct. 695 (1997); State v.

Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Buff, concur. FINNEY, C.J., dissenting in a separate opinion.

FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. § 16-3-20, all capital defendants face one of three sentences:

> (1) death; or
>
> (2) life in prison until death; or
>
> (3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1]In this opinion and in State v. Starnes, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole. . . or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under § 16-1-10(d)(Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole. Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was United States v. Flores, 63 F.3d 1342 (5th Cir. 1995). Flores involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that Simmons does not directly control this case[2], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simply truth: no parole. The majority acknowledges, as it must,[3] that parole considerations "could" affect a jury's sentencing decision,[4] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2]We are not concerned with whether a Simmons charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3]Given the regularity with which capital juries inquire about parole, we cannot deny its role in sentencing.

[4]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

The Supreme Court of South Carolina

The State, Respondent,

v.

Wesley Aaron Shafer, Jr., Petitioner.

ORDER

This Court recently affirmed petitioner's murder conviction and his death sentence. State v. Shafer, Op. No. 25120 (S.C. Sup. Ct. filed May 8, 2000)(Shearouse Adv. Sh. No. 18 at 35). Petitioner has now filed a consent motion seeking a stay of remittitur and a stay of execution to allow him to file a petition for a writ of certiorari with the United States Supreme Court. Respondent agrees that petitioner is entitled to a stay of execution since petitioner's proposed questions are appropriate for inclusion in a petition for a writ of certiorari to the United States Supreme Court. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Petitioner's request for a stay of remittitur is denied. Petitioner's

request for a stay of execution is granted. The stay of execution shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases.

IT IS SO ORDERED.

A.C.J.

J.

J.

J.

Toal, C.J., not participating

Columbia, South Carolina

June 6, 2000

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and

the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for

thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

Shearouse Adv. Sh. No.
S.E. 2d

THE STATE OF SOUTH CAROLINA

In The Supreme Court

State of South Carolina, Respondent,

v.

Wesley Aaron Shafer,

Jr., Appellant.

Appeal From Union County

John C. Hayes, III, Circuit Court Judge

Opinion No. 25120

Heard October 7, 1999- Filed May 8, 2000

AFFIRMED

David I. Bruck, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Solicitor Thomas E.Pope, of York, for respondent.

BURNETT, A.J.: Appellant admitted he shot and killed Ray Broome while attempting to rob the convenience store where Broome was

working. Appellant maintained the killing was without malice.[1] A jury convicted appellant of murder, attempted armed robbery, and conspiracy. He was sentenced to death for murder and consecutive terms of twenty years' imprisonment and five years' imprisonment, respectively, for attempted armed robbery and conspiracy.[2] Appellant appeals.

FACTS

Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.

At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.

Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned

outside.

Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the

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[1]During the penalty phase of trial, appellant's expert witness testified appellant shot Broome in response to a lifetime of abuse and violence.

[2]The jury found the statutory aggravating circumstance of murder while in the commission of an attempted armed robbery while armed with a deadly weapon. S.C. Code Ann. §16-3-20(C)(a)(1)(d) (Supp. 1998).

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register counter, and shot Broome a second time.[3]Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.

Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store, found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head.[4] Broome died at the hospital.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

ISSUES[5]

I. Did the trial court err by refusing to instruct the jury appellant was parole ineligible?

II. Did the trial judge err by granting the State's motion to prohibit both the prosecution and defense from referring to the Bible or using religious references during closing argument?

III. Did the trial judge err by refusing to allow appellant to reopen the record to present evidence on deterrence or, alternatively, for a curative instruction after the solicitor argued

[3]Appellant waited eight seconds before firing the second shot.

[4]All the events inside the Hot Spot were recorded on the store's security camera.

[5]All issues stem from the sentencing phase of appellant's trial.

the general deterrent effect of the death penalty?

DISCUSSION

I.

Appellant argues, for various reasons, the trial court erred by refusing to instruct the jury he was parole ineligible. We disagree.

After closing arguments, relying on *Simmons v. South Carolina*, 512 U.S. 154 (1994), appellant requested the trial court instruct the jury he would be ineligible for parole. The trial court denied the request.

Thereafter, the trial judge instructed the jury "life imprisonment means until the death of the defendant." He later stated: "[i]n deciding whether to sentence the defendant to death or to life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death."

After three and one-half hours of deliberation, the jury returned with the following questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?

2. Under what conditions would someone convicted for murder be eligible?

Regarding Question 1, appellant agreed the trial court should instruct the jury "life imprisonment means until the death of the offender" and requested the court read the portion of §16-3-20(A) which explains no person sentenced to life imprisonment is eligible for parole or any other form of release or credits which would reduce a life sentence. Appellant stipulated Question 2 could not be answered. After the trial judge informed the parties of his intended response to the jury's questions, appellant requested the trial

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judge delete any reference to parole eligibility.[6]

The trial judge responded to the jury's questions as follows:

Your consideration is restricted to what sentence to recommend.

I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, 'for the purposes of this section life imprisonment means until the death of the offender.' Parole eligibility or ineligibility is not for your consideration.

Appellant excepted stating, "we would renew our objection under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the State and Federal Constitutions." The trial judge noted the exception.

A.

Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends *Simmons* mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.

When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. *Id.; State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in

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[6]The trial judge stated he would charge the jury as follows: "[y] our consideration is restricted to what sentence to recommend. I will, as trial judge, impose the sentence you recommend. Section 16-3-20 of the South Carolina Code of Laws provides that for the purpose of this section life

imprisonment means until the death of the offender. Parole eligibility is not for your consideration."

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his view, would not pose a future danger to society." *Simmons* , 512 U.S. at 165 (1994) (plurality opinion).

Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. §16-3-20 (Supp. 1998). Under the new sentencing scheme, a defendant can be sentenced to 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000) (Shearouse Adv. Sh. No. 18 at 17).[7] Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defend: nt. *Simmons,* U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death *under state law* was life imprisonment without the possibility of parole. . ."). (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and,

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[7]In *Starnes*, we suggested, under the terms of the statute, it is arguable a defendant could be sentenced to more than thirty years and be

eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

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therefore *Simmons* is inapplicable); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994); *cert. denied*, 514 U.S. 1108 (1995) (Simmons applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 665 N.E.2d 1228 (Ill.), *cert. denied,* 519 U.S. 982 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 462 S.E.2d 1(N.C. 1995), cert. denied, 516 U.S. 1133 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable.[8]

B.

Appellant contends the failure to inform the jury he was parole ineligible violated the Eighth Amendment prohibition against the arbitrary

[8]The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes*, *supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

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infliction of the death penalty.[9] He specifically argues the failure to inform the jury of his parole ineligibility prevented him from presenting mitigating evidence in support of a sentence less than death and diminished the reliability of the jury's sentencing decision. In light of the new sentencing statute, he asks the Court to reconsider its policy prohibiting the trial judge from informing the jury a capital defendant is parole ineligible.

Initially, we note this issue is not properly preserved for appellate consideration. After the trial judge responded to the jury's question, appellant stated he excepted "on the basis of the Eighth Amendment." He offered no explanation or argument in support of the exception. Appellant's objection to the supplemental instruction is simply too vague for the Court to review. *State v. Bailey*, 253 S.C. 304, 170 S.E.2d 376 (1969) (general objection leaves nothing for Court to review). Clearly, appellant never argued, as he does now, that the Eighth Amendment requires a charge on parole ineligibility as mitigating evidence and to ensure the reliability of the sentence imposed. *McKissick v. J.F. Cleckley & Co.*, 325

S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) (an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge).

In any event, the Eighth Amendment requires that a death sentence not be imposed arbitrarily. *Jones v. United States,* 527 U.S. 373 (1999). It prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence" which could cause the jury to decline to impose the death penalty. *Pane v. Tennessee,* 501 U.S. 808, 822 (1991), *citing Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The United States Supreme Court has "deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 463 U.S. 992, 1001(1983). Whether parole eligibility is relevant to the sentencing determination is a matter of state law. *Id.; see Simmons v. South Carolina*, 512 U.S. 154, 176 (O'Connor, J., concurring) ("[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the

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[9]U.S. Const. amend. VIII.

States.").[10]

In South Carolina, parole eligibility is not relevant to a jury's sentencing considerations. *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1995) (defendant who was parole eligible after service of thirty years not entitled to charge on parole eligibility). The refusal to inform the jury of the capital defendant's parole eligibility does not violate the Eighth Amendment. *Id.*

Although we have never explicitly ruled whether the Eighth Amendment entitles a capital defendant to a charge informing the jury he is parole *in*eligible, precedent suggests no such instruction is required.[11] In *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (Chandler, J., concurring), the Court held the defendant who was parole ineligible due to a prior conviction for a violent crime was not entitled to a charge informing the jury of his parole ineligibility. In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied* 513 U.S. 1166 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), we concluded there was no Eighth Amendment violation where the trial judge

did not instruct the jury the defendant was parole ineligible but defense counsel argued "life imprisonment" means the defendant will never be released from prison. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court declined to hold the Eighth Amendment requires the jury to be informed a capital defendant is parole ineligible.

Relying on *Skipper v. South Carolina*, 476 U.S. 1 (1986), appellant asserts parole ineligibility is a mitigating circumstance of which the jury should have been informed. We disagree.

As noted above, the Eighth Amendment prohibits the State from limiting the sentencer's consideration of "any relevant mitigating evidence."

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[10] *O'Dell v. Netherland*, 521 U.S. 151, 165 (1997) ("[i]n *Simmons*, the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of the postsentencing legal eventualities.").

[11] Appellant agrees there has been a blanket prohibition against any

instruction on parole eligibility or ineligibility.

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Payne v. Tennessee, 501 U.S. 808, 822 (1991). For purposes of the Eighth Amendment, mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina,* 476 U.S. 1, 4, *citing Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *see State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (mitigating circumstances are details specific to the character of the defendant on trial and/or the circumstances of the crime he committed which are considered in order to reduce the degree of his moral culpability or guilt). In *Skipper*, the Supreme Court held evidence of the defendant's good behavior while in jail awaiting trial was potentially mitigating because it indicated he would not pose a danger in the future. Accordingly, excluding evidence of the defendant's future adaptability violated the Eighth Amendment.

Unlike a defendant's behavior in prison, parole ineligibility is not an aspect of a defendant's character or record. Parole eligibility or

ineligibility is a legislative determination; it is not mitigating evidence. *See State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989), *vacated on other grounds* 493 U.S. 1013 (1990) (information regarding requirements for parole eligibility is not mitigating evidence); *State v. Matthews*, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 489 U.S. 1091(1989) (punishment for a crime cannot serve as a mitigating sentencing consideration); *see also State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (the general effect of capital punishment as a deterrent to crime is not a mitigating circumstance). The Eighth Amendment is not violated by refusing to inform the jury a capital defendant is parole ineligible.

Appellant asserts since all capital defendants are now parole ineligible, the Court should permit juries to be informed of parole ineligibility. He claims providing juries with accurate information on parole ineligibility will eliminate prejudicial misinformation juries hold concerning parole eligibility and produce more reliable sentencing determinations. We disagree.

Traditionally, in South Carolina it is the jury's duty and responsibility in the sentencing phase of a capital trial to impose a

punishment authorized by law in consideration of the circumstances of the crime and the characteristics of the individual defendant. The jury is not authorized to legislate a plan of punishment. *State v. Plath*, 281 S.C. 1, 313

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S.E.2d 619, *cert. denied* 467 U.S. 1265 (1984); *see State v. Atkinson*, 253 S.C. 531, 172 S.E.2d 111(1970), *citing State v. White*, 142 A.2d 65, 76 (N.J. 1958) ("the Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs."), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The jury's duty is the same under the new sentencing statute. While a defendant's parole ineligibility could affect the jury's decision, it nonetheless remains an irrelevant factor which the jury should not consider. Affirmatively mentioning an irrelevant factor would undermine the jury's decisionmaking process and result in a decision which is less, rather than more, reliable. As a matter of policy, we maintain it is inappropriate to inform the jury the capital defendant is parole

ineligible. The Eighth Amendment does not compel a different result. *Jones v. United States*, 527 U.S. 373,__, 119 S.Ct. 2090, 2099 (1999) (a death sentence is not arbitrary within the meaning of the Eighth Amendment "if the jury is not given any bit of information that might possibly influence the individual juror's voting behavior.").

C.

Appellant argues the trial judge's supplemental instruction was erroneous. He contends 1) in responding to the jury's questions, the trial judge should have informed the jury he was parole ineligible, 2) the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," incorrectly suggested he was parole eligible, and 3) the trial judge erred by refusing to read that portion of the sentencing statute which referred to parole ineligibility. We disagree.

1.

As noted above, parole eligibility or ineligibility is not relevant to a capital jury's sentencing considerations and the issue of parole should not be injected into the jury's deliberations. *State v. Ard*, 332 S.C. 370, 505

S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d. 315 (1991). When a *jury inquires* about parole, the trial court should instruct the jury it shall not consider parole eligibility in reaching its decision and the terms

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"life imprisonment" and "death penalty" should be understood in their ordinary and plain meaning. *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).[12]

In keeping with *Norris*, the trial judge's supplemental instruction properly told the jury not to consider parole eligibility or ineligibility. Although *Norris* was decided prior to the new sentencing statute, we find no reason to require a different response when the jury inquires about parole.

Moreover, as noted above, three potential sentences were

available: 1) death, 2) life imprisonment, or 3) a mandatory minimum thirty year sentence. Appellant was not eligible for parole under any of these sentences.[13] Nonetheless, as suggested by appellant, by asking for information on parole, the jury was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment. Informing the jury appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

2.

Furthermore, contrary to appellant's argument, the trial judge's admonition, "parole eligibility or ineligibility is not for your consideration," did not suggest appellant was parole *eligible*. Unlike the admonitions in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "you are not to consider parole" and parole "is not a proper issue for your consideration," the instruction here specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole

[12] In *Ard* we held the trial judge's erroneous mention of parole was harmless. To the extent *Ard* suggests the trial judge should charge the jury

on parole eligibility if requested by the defendant, it is overruled. We note *Ard* was decided eight months after the present case was tried.

[13] *But see* footnote 7.

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eligible.

3.

Finally, in response to the jury's questions, appellant requested the trial judge read that portion of the sentencing statute highlighted below:

A person who is convicted of or pleads guilty to murder must be punished by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. *If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt*

pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, `life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.

Section 16-3-20(A) (Supp. 1998).

We find no error or prejudice from the trial judge's refusal to read the highlighted portion of the statute. Again, neither parole eligibility nor parole ineligibility are proper considerations for the jury. *State v. Ard*,

332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, appellant's suggestion that providing the jury with the highlighted language would promote "truth-in-sentencing" is

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tenuous. The highlighted text provides the jury with only those portions of the sentencing statute which appellant deems favorable but excludes any reference to other less favorable sentencing options.

We conclude the supplemental instruction was appropriate.

II.

Appellant argues he was deprived of his right to make religious arguments to the jury. We disagree.

Over appellant's objection, the trial judge granted the State's motion to prohibit. references to the Bible or religion during closing argument by both the prosecution and defense. Appellant proffered several religious arguments he had considered including in his closing argument.

In his closing argument, appellant stated:

There's a story about a woman who broke the law a long, long, long time ago. Before we had electricity, before we had lethal injection, we still had the death penalty. There was a time that she had been caught, she was caught for breaking the law, and the people in her community gathered around her, and they were going to kill her for what she had done. They had the objects they were going to use to kill her in their hands, and she stood before them. Somebody walked in and said 'I'm not denying that what she did was wrong, this isn't about what she did was wrong, this is about what statement are you going to make about being confronted with this.'

The story that I referenced, a very great man discussed with them about not killing the woman, and they didn't.

We find no error in the trial judge's ruling. Previously, we have held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied* 522 U.S.__ , 118 S.Ct. 146 (1997). In any event, the. record clearly demonstrates appellant was not prejudiced by the trial judge's ruling. Although he was not permitted to

make all of his religious arguments, appellant conveyed the Biblical story of Jesus and the adulterous woman. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicated he made the argument nonetheless). The trial judge did not abuse his discretion in granting the State's motion to prohibit references to the Bible or religion during both the prosecution and defense closing arguments. *See State v. Patrick*, 289 S.C.

301, 345 S.E.2d 481 (1986)[14](trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will riot be disturbed).

III.

In the penalty phase closing argument, the solicitor argued the death penalty deters others from committing murder. Thereafter, appellant requested the trial judge either reopen the case to allow him to present statistical evidence the death penalty does not deter murder or, alternatively, to instruct the jury to disregard the solicitor's comments regarding general deterrence. The trial judge denied both requests. Appellant argues this was error. We disagree.

In South Carolina, our case law is abundantly clear: while both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).[15]Accordingly, the trial judge did not err by refusing appellant's request to reopen the record for the purpose of presenting evidence on the deterrent effect c f the death penalty.

Furthermore, we have never directly held it is reversible error to refuse to give such a curative instruction where the solicitor argues general

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[14]*Overruled on other grounds Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Casey,* 305 S.C. 445, 409 S.E.2d 391(1991).

[15]Because the General Assembly has approved the propriety of capital punishment, evidence attempting to establish its effectiveness or ineffectiveness as an instrument of deterrence is irrelevant.

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deterrence. *See State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied* 519 U.S.__ , 117 S.Ct. 695 (1997) (where solicitor argued specific deterrence, requested charge on general deterrence was not required); *State v. Longworth*, 313 S.C. 360, 438 S.E.2d 219 (1993), *cert. denied* 513 U.S. 831 (1994) (where solicitor did not argue general deterrence, refusal to charge

general deterrence need not be considered); *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied* 471 U.S. 1036 (1985), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (refusal to charge general deterrence is properly refused as function of jury is to determine appropriate penalty for present charge). In fact, our cases have repeatediy allowed the solicitor to argue his opinion regarding the deterrent effect of capital punishment. *State v. Truesdale*, 301 S.C. 546, 393 S.E.2d 168, *cert. denied* 498 U.S. 1074 (1990); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied* 462 U.S. 1124 (1983), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Since argument on general deterrence is permitted, it would be illogical to instruct the jury it may not consider the effect of its sentence on others.

Finally, in light of his freedom to argue capital punishment does not discourage others from committing murder, appellant's due process was not violated by the trial judge's denial of his request to present evidence on general deterrence or charge the jury not to consider the deterrent effect of the death penalty.

PROPORTIONALITY REVIEW

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance is supported by the evidence. *See* S.C. Code Ann.§16-3-25 (1985). Further, we hold the death penalty is neither excessive nor disproportionate to that imposed in similar cases. *See State v. Hughes*, 328 S.C. 146, 493 S.E.2d. 821(1997), *cert. denied*, 523 U.S.__ , 118 S.Ct. 1674 (1998); *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S.__ , 118 S.Ct. 146 (1997); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57, *cert. denied*, 520 U.S.__ , 117 S.Ct. 2460 (1996); *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52, *cert. denied*, 520 U.S.__ , 117 S.Ct. 2441 (1996); *State v. MeWee*, 322 S.C. 387, 472 S.E.2d 235 (1996), *cert. denied*, 519 U.S.__, 117 S.Ct: 695 (1997); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992).

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justice Thomas C. Huff,

concur. FINNEY, C.J., dissenting in a separate opinion.

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FINNEY, C.J.: I respectfully dissent, and would reverse and remand for a new sentencing proceeding.

Under the 1996 amendments to S.C. Code Ann. §16-3-20, all capital defendants face one of three sentences:

(1) death; or

(2) life in prison until death; or

(3) unconditional release after service of a minimum term of thirty years, with no possibility of parole.[1d]

Appellant contends that since he was parole ineligible as a matter of state law, the jury was entitled to be charged this fact when they inquired. I agree.

The majority deems the holding in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2178, 129 L.Ed.2d 133 (1994), inapplicable because appellant's sentencing options were not limited to death or life without

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[1d] In this opinion and in *State v. Starnes*, Op. No. 25119 (S.C. Sup. Ct. filed May 8, 2000), the Court has avoided directly deciding the parole eligibility status of a. capital defendant who receives a term of years sentence. In my opinion, we must decide this question today in order to address the jury charge issues raised by appellant. The murder statute is clear as to certain defendants: "No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole... or any other credits which would reduce the mandatory minimum term of imprisonment for thirty years required by this section." § 16-3-20(A) (Supp. 1999). Since the murder statute is silent as to the parole eligibility of defendants receiving a sentence in excess of the mandatory minimum, the general rule controls. Under §16-1-10(d)(Supp. 1999), murder is exempt from the classification system, and under § 24-13-100 (Supp. 1999), persons convicted of exempt offenses are ineligible for parole.

Thus, although a capital defendant may receive a sentence of a term of years, he is ineligible for parole whatever the duration of that term.

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possibility of parole, and cites a number of cases in support of this proposition. In all the cited cases except one, however, the defendant's sentencing possibilities included one in which he would be parole eligible. The only case in which the defendant did not face a potential parolable sentence was *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). *Flores* involves a federal conviction, and parole has been abolished in the federal system. It is inapposite to the present South Carolina sentencing scheme, as are all the other cases cited. While I concede that *Simmons* does not directly control this case [2d], the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal.

Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as the majority suggests in Part I C, then why not adopt a policy which gives the jurors the simple truth: no parole. The majority acknowledges, as it must,[3d] that parole considerations "could" affect a jury's sentencing decision,[4d] but then deems it "irrelevant" and denigrates its importance as "[a] bit of information that might possibly influence the individual juror's voting behavior." The specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth.

Of course, I would not stop with a charge that the defendant was

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[2d] We are not concerned with whether a *Simmons* charge was warranted at the initial charge to the jury since future dangerousness was not an issue, but rather with the procedure to be followed when a capital jury inquires about parole.

[3d] Given the regularity with which capital juries inquire about parole,

we cannot deny its role in sentencing.

[4d]See Bowers, Vandiver & Dugan, *A New Look at Public Opinion On Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J.Crim.L. 77 (1994).

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not parole eligible, for that is only half the truth. I would tell the jury that if no aggravating circumstance is found, the defendant faces a minimum of thirty years without possibility of early release, but that if aggravating circumstances are found, then the alternatives are death or life in prison until death.

For these reasons, and with instructions that henceforth juries which inquire shall be charged the truth about sentencing, I would reverse and remand for a new sentencing proceeding in this matter.

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